86-533

No. _____

Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STUART STEIN,

Respondent,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, BUREAU OF PUPIL TRANSPORTATION, and LEONARD A. DAVID,

Petitioners.

SUPPLEMENTAL APPENDIX TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 26, 1986

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APPENDIX C

Special Interrogatories Given to the Jury in the District Court With Jury's Responses, Stein v. Board of Education, et al.

QUESTIONS FOR THE JURY

1. Did the plaintiff show by a preponderance of the evidence that he did not receive adequate notice of the charges against him sufficient to enable him to prepare to respond to them?

X Yes _____ No

2. Did plaintiff show by a preponderance of the evidence that at the hearing of April 12, 1982 plaintiff did not receive an explanation of the evidence against him or an opportunity to state, either orally or in writing, his reasons why the action should not be taken against him?

_____ Yes X No

Answer question 3 only if you have answered either question 1 or question 2 "yes".

3. Did plaintiff show by a preponderance of the evidence that defendants ACJ Transportation Corp. and DiDomenico conspired with a person or persons at the Board of Education or both to deprive plaintiff of his right to adequate notice or an adequate hearing (as the court has defined those terms)?

_____Yes __X__No

4. Did plaintiff show by a preponderance of the evidence that defendant DiDomenico in making the statements in the letter of April 3, 1982 was motivated by personal malice or ill will toward plaintiff, or knew that the statements were false, or made the statements with reckless disregard for whether they were true or false?

_____Yes __X__No

5. Did defendants show by a preponderance of the evidence that all the statements in the letter of April 3, 1982 were true either in substance or verbatim?

____Yes __X__No

QUESTIONS FOR THE JURY

1. What total amount of damages did plaintiff sustain for lost wages?

$15,000.00

2. What total amount of damages did plaintiff sustain for the mental and emotional distress that he suffered as a result of not receiving adequate notice?

$0.00

APPENDIX D

Relevant Portion of Petitioners' Proposed Jury Instruction in the District Court *Stein v. Board of Education, et al.*

Proximate Cause of Injury

30. The fourth and final element that the plaintiff must establish against defendants, by a preponderance of the evidence, is that the defendants actions and conduct were the proximate cause of the injury and consequent damage to plaintiff. [See Devitt and Blackmar F.P.J.I. §92.05] An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission. [See Devitt and Blackmar F.P.J.I. §80.18.]

Plaintiff's Burden

31. In order for the plaintiff to prevail in his claim for damages against the defendants he must establish, by a preponderance of the evidence, as defined in par. 13, each one of the four necessary elements I have described. If plaintiff fails to satisfy you of even one part of these elements, then plaintiff's claim must fail. If that is the case, you must render a verdcit in favor of the defendants.

THE CIVIL RIGHTS CLAIMS AGAINST THE BOARD

32. Plaintiff has also asserted a claim, under Title 42 U.S.C.A. §1983, against the Board of Education of the City of New York. A governmental entity, such as the Board, cannot be held liable for the actions of its employees, under a civil rights claim,

unless their actions can be said to fairly represent an official policy or custom of that governmental entity Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978). Therefore, in order for plaintiff to prevail on his claim against the Board he must show you, by a preponderance of the evidence, that the actions of the defendants were in furtherance of an unconstitutional or unlawful official policy or custom of the Board. Isolated incidents of negligence or misbehavior of its employees do not make a government policy. Secondly, the plaintiff must show, by a preponderance of the evidence, that such a policy or custom was the "moving force" behind any violation of the plaintiff's rights,

Dominguez v. Beame, 603 F.2d 337 (2d Cir. 1979), cert. denied, 446 U.S. 417, 100 S.Ct. 1850, L.Ed.2d (1980).

33. The word policy implies a course of action consciously chosen for among various alternatives. Proof of a single incident of unconstitutional activity is not sufficient to impose liability upon the Board. City of Oklahoma City v. Tuttle, ___U.S.___(6/3/85).

DAMAGES UNDER THE CIVIL RIGHTS CLAIMS

34. My charge on the law of damages must not be taken as an indication that you should find for the plaintiff in this action. You are to decide whether the plaintiff should prevail, entitling him to damages, based upon a preponderance of the evidence presented and the rules of law I have just instructed you on. If you find for

the defendants, you do not need to consider the issue of damages. Only in the event that you find for the plaintiff, as against the defendants, must you consider the issue of damages.

35. The law of damages in a federal civil rights suit is governed by the principle of reasonable compensation. If you should find that the plaintiff is entitled to a verdict, you may award him only such damages as will reasonably compensate him for such injury and damages as you find, from a preponderance of the evidence, that he has sustained as a proximate result of the incident. To award compensatory damages without a showing of actual injury, by a preponderance of the evidence, would amount to a windfall for the plaintiff. The only damages which

you may award, absent a showing of actual injury by a preponderance of the evidence, are nominal damages, not to exceed one dollar. Carey v. Piphus, 435 U.S. 247, 98 St. Ct. 1042, 55 L.Ed.2d 252 (1978).

No Speculative Damages

36. You are not permitted to award speculative damages. So, you are not to include, in any verdict, compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future. [See Devitt and Blackmar, F.P.J.I. §85.08.]

Damages Must Be Proximately Caused

37. You are not to award damages for any injury or condition from which the plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the

evidence, that such injury or condition was proximately caused by the acts complained of. [See Devitt and Blackmar F.P.J.I. §85.09.]

Damages - Loss of Earnings

38. If you should find that plaintiff is entitled to a verdict, then in arriving at the amount of the award you may include: the reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by the plaintiff since the injury, because of being unable to prusue his occupation, as a proximate result of the injury. In determining this amount, you should consider any evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find

APPENDIX E

Relevant Portion of Colloquy in District Court Regarding Jury Instructions, Stein v. Board of Education, et al.

MS. JONAS: I would ask a charge of nominal damages, the fact if they find that the board had just cause to fire him only nominal damages be awarded. I refer the case Papadakis v. Bresenoff which follows Carey v. Piphus, held in a similar situation that at most at this stage this Court can only order a new hearing; that if the new hearing finds in fact there was just cause of if the jury, I suppose, in fact it was just cause only nominal damages would be awarded. That was recently affirmed by the Second Circuit.

THE COURT: I focused on that precise question because you raised it before. I don't think that's right in this context. I read both cases. It's true that if the circumstances are such

that in the case itself he's gotten due process; that is, say, if he had the notice prior to the hearing so -- prior to his hearing before Mr. David -- so that he was equipped to present his case and they didn't for one reason or another, notice hadn't been given before but at the time he got to the hearing he had had adequate notice, he was able to defend himself, it's true if they found he was dischargeable, then you would only get nominal damages.

However, in this instance it seems to me he wasn't given notice -- the jury found he wasn't given adequate notice to enable himself to prepare himself; therefore, he wasn't equipped at that point to bring to bear all of the considerations which could have entered

into Mr. David's head at the time of the hearing. I can't say and no one can say at this point -- even Mr. David I don't think would have been competent for him to say it wouldn't have made any difference whether, for example, he showed Maxine Brown was lying; that none of these others actually happened; that incident with respect to Ms. Richburg was misstated to the extent she didn't leave because of this accident but because of other reasons and her attitude to them.

So, we can't say as we sit here now, addressing the first point of whether the jury could find that which is what you're asking me to charge, we can't say whether when it goes back to the hearing or not, when it goes back for a new hearing, we can't say as a

matter of law whether or not the city will decide that he should be decertified Until that happens he's entitled to be certified. If he's entitled to be certified he's entitled to have his job.

MS. JONAS: Yes, he may be entitled to be certified, but not entitled to damages.

THE COURT: I don't understand why not. Why not? Maybe you can explain it to me.

MS. JONAS: Take a look at this decision, in this case no hearing was given whatsoever to an affiliate of a city agency. The Court found that a hearing --

THE COURT: You want me to read the case?

MS. JONAS: Yes.

THE COURT: Certainly.

MS JONAS: No damages could be awarded --

THE COURT: I'll read the case. I read a lot of cases Friday when you were all resting.

(Pause)

THE COURT: This is exactly the point I was making; that is, where there's a due process hearing which he finds that there was, a due process hearing a couple of months after, just about three months, then were he's afforded a due process hearing which results in the termination of his employment then, of course, there would only be nominal damages, but that's not what happened here.

The due process hearing wasn't accomplished here because he didn't have time to prepare himself or the notice to

prepare him I agree with this case. As it's stated here, that's what Carey v. Piphus was. That's not this case.

MS. JONAS: If I may, in this case, Papadakis, he didn't hold a hearing until the judge made a finding. I think it was the judge, though it's unclear judge or jury, after a trial that he was entitled to due process and remanded the case back to the agency to give him the hearing which I think is the status we're at here.

THE COURT: Maybe they left out that month where he would have been or a couple of months.

To the extent this is inconsistent with what I'm holding I don't agree with it. I don't think it's inconsistent.

MS. JONAS: Your Honor, it was affirmed by the Appellate Court.

THE COURT: You know, the Court of Appeals will focus on it for you if you think it worthwhile, depending upon what the damages are.

MS. JONAS: Of course I'll take exception.

THE COURT: Pardon?

MS. JONAS: I'll take exception.

APPENDIX F

Relevant Portion of Jury Instructions from Trial Transcript in the District Court Stein v. Board of Education, et al.

THE COURT: Members of the jury, since you found plaintiff didn't get adequate notice of the charges against him you will now consider the the question of damages that plaintiff is entitled to receive from the defendants, the Board of Education and Mr. David.

Compensatory damages are such as to reimburse a person for actual losses proximately caused by the defendants' acts found to be wrongful.

What does proximate cause mean: The plaintiff, as you know, has the burden of proving by a preponderance of the evidence that the defendants' wrong was the proximate cause of the plaintiff's damages. Damages proximately caused by an act, if the act played a substantial part in bringing about an actual -- or actually causing the damage.

This compensatory rule is used to attempted to put the injured part back in the same position as he would have been ahd the wrongful conduct never occurred. The burden is on the plaintiff to prove these matters by a preponderance of the evidence. His damages can include both the wages he has lost to date because he's never received adequate notice and also compensation for mental and emotional distress he suffered as a result of not receiving adequate notice of the charges against him.

Plaintiff had a duty, has a duty, to mitigate his damages by seeking other sources of income and employment during the period from his discharge until the date of the trial. You must deduct, therefore, the amounts, if any, that you find plaintiff actually earned from

other employment from the time of his discharge until the time of the trial date, the amount that he received from unemployment insurance and the amount that he could have earned during that period by the exercise of reasonable diligence in similar employment during that period.

Defendant has the burden, by the way, of proving the amount of that deduction for the amount he could have earned by the exercise of reasonable diligence.

The placing of a dollar value on someone else's mental or emotional distress is a difficult task. You just have to use your best judgment. Proof of these questions is necessarily difficult and subjective, but mere speculation and conjecture is not

sufficient for you to award damages of this type. The plaintiff is entitled to recover only -- only -- for that pain and suffering that were caused by not receiving adequate notice of the charges against him. He's not entitled to recover for any mental and emotional distress that may have resulted from the nature of the charges that were made against him or from the fact that he lost his job. There's a distinction there. It's only the lack of notice and the feelings that he had with respect to that that you can consider, but not the feelings that hemay have had because of what was said about him or what his family thought about those charges, his embarrassment because of the nature of the charges. He's not entitled, in other words, for any damages for any distress or himiliation that he may have

experienced because he felt the charges made against him were untrue, that they disgraced him. That's not a part of your calculation of damages.

Since I want you to break these damages down into two questions, one, what total amount of damages did plaintiff sustain for lost wages in accordance with how it was instructed and two, what total amount of damages did plaintiff sustain for the mental and emotional distress that he suffered as a result of not receiving adequate notice?

Remember, when you reached -- by the way, all the rest of my instructions about witnesses and all that you heard before you went back to deliverate on liability, all of those apply.

When you reach a verdict just send me a note saying you reached a verdict.

You have to be unanimous in that note. You should -- this is a dollar amount to fill in in each instance.

The marshall has already been sworn. We'll send the exhibits in to you to the extent they are relevant that you can consider them, as well as all the testimony.

Would you retire then, commence your deliberations on this? I'll give you, Mr. Foreperson, this set of questions.

(jury leaves courtroom).

Please give the exhibits to the marshal. I don't know if they have their pencils and papers in there.

We'll take back these questions. They are not part of the evidence on liability.

(Said documents handed to themarshal).

THE COURT: (Continuing) I hope we have a verdict before lunch.

I'm going to take on another case if you would like to clear away from the table.

(Jury deliberating)

Time noted 11:20 a.m.